PETER YIP SHOU SHAN

v.

GEORGE KENT (MALAYSIA) BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: S5-24-1540-1990]
25 JANUARY 2002

CIVIL PROCEDURE: *Costs - Interpleader summons - Liability to pay costs of proceedings - Upon whom - Whether applicant who filed interpleader summons - Whether unsuccessful claimant*

CIVIL PROCEDURE: *Interpleader summons - Costs of proceedings - Liability to pay costs - Upon whom - Whether applicant who filed interpleader summons - Whether unsuccessful claimant*

The applicant, who was the solicitor for George Kent (Malaysia) Berhad ('George Kent'), was instructed not to release two letters to Interconstruction (M) Sdn Bhd ('Interconstruction'). The two letters pertained to an agreement between George Kent and Interconstruction. Interconstruction, however, claimed that there was a duty on the part of the applicant to deliver the letters to it and threatened the applicant with legal action. The applicant, therefore, filed an interpleader summons to summon George Kent and Interconstruction to court to have their rights and claims determined. The senior assistant registrar ('SAR') ordered the applicant to release the letters to Interconstruction and pay the costs of the proceedings personally. The applicant now appealed against that part of the SAR's decision, ordering him to pay the costs of the proceedings.

Held:

[1] An applicant for relief by way of an interpleader, in a proper application, should, in principle, not be liable to pay costs but should instead be paid costs by either of the claimants, because it is their conflicting claims that have compelled him to seek relief. The claimant liable to pay costs of the applicant should be the claimant who fails in the claim and who should also bear the costs of the successful claimant. (p 208 b-c)

[2] If the SAR had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It is only when the application is dismissed that the applicant should be liable to pay costs. By ordering that the letters be released to Interconstruction, it was presumed that the SAR had found the application to have been properly brought and had proceeded in a summary way, under O. 17 r. 5(2) Rules of the High Court 1980 to determine the

question at issue between the claimants, which she did in favour of Interconstruction. Therefore, it was not just for the applicant to pay the costs of the claimants. Rightfully, George Kent should pay the costs of Interconstruction and of the applicant. (p 208 d-h)

[Appeal allowed; order of SAR as to costs set aside.]

Legislation referred to:
Rules of the High Court 1980, O. 17 rr. 5(2), 18

Other source(s) referred to:
Mallal's Supreme Court Practice, 2nd edn, 1983, vol 1, p 168

For the applicant - PK Chong; M/s Peter Yip & Yong
For the 1st claimant - HY Lee; M/s PM Tan & Co
For the 2nd claimant - Beldan Premaraj; M/s Skrine & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

In this case George Kent (Malaysia) Berhad ("George Kent") had issued two letters dated 1 August 1988 and 22 November 1988 addressed to Interconstruction (M) Sdn. Bhd. ("Interconstruction"). The letters constituted or contained an agreement between, *inter alia*, George Kent and Interconstruction. George Kent entrusted the two letters to their solicitor, the applicant. The applicant wrote to Skrine & Co. ("Skrine"), solicitors for Interconstruction, to give his "irrevocable solicitor's undertaking" that he would release the letters to them on their request, provided they confirmed that Interconstruction had instructed them that the agreement had been breached.

On 17 November 1990 Skrine wrote to the applicant to say that Interconstruction had instructed them that George Kent were in breach of the agreement and to ask for the release of the two letters.

George Kent instructed the applicant not to release the two letters. Interconstruction threatened legal action against the applicant if he refused to release the two letters. So the applicant filed the interpleader summons in this case to summon George Kent and Interconstruction to court to have their rights and claims determined.

Interconstruction filed an affidavit in reply to the applicant's affidavit in support of his application, in which, *inter alia*, they maintained that the applicant's undertaking was clear and unequivocal and should be performed and they therefore asked that the interpleader summons be dismissed and that the applicant and George Kent pay the costs of the proceedings. It is clear that Interconstruction's stand in the affidavit was that the applicant had a clear and unequivocal duty to deliver the letters to them and should have done so

instead of seeking relief by way of an interpleader application, which application was therefore improper and should be dismissed with costs to be borne by the applicant and George Kent.

George Kent's affidavit in reply gave reasons why the letters should not be released to Interconstruction and asked that they be returned to them and that the costs be paid by the applicant or by Interconstruction. In other words, unlike Interconstruction, George Kent were asking the court to proceed to determine the dispute between them and Interconstruction about the letters that was brought by the interpleader summons and to decide the dispute in their favour.

At the hearing before the learned senior assistant registrar on 25 July 1991, consistent with Interconstruction's stand in their affidavit, counsel for Interconstruction raised the preliminary point that the case was not suitable for interpleader because there was a clear duty on the part of the applicant to deliver the letters to Interconstruction. He then proceeded to submit on the merits in case the preliminary point should fail. If the senior assistant registrar had considered the preliminary point as valid, the proper decision for her to make should have been to dismiss the application and to order the applicant to pay costs, at least the costs of Interconstruction. But after hearing submission on all sides she ordered the applicant to release the letters to Interconstruction and pay the costs of the proceedings personally. In his submission, consistent with the stand taken in George Kent's affidavit, their counsel had argued against releasing the letters and made certain alternative suggestions.

George Kent filed an appeal against the decision to release the letters to Interconstruction but later withdrew the appeal.

The applicant appealed against the decision that he pay the costs of the proceedings. Submissions were made on the appeal before NH Chan J (as he then was), and the parties have asked me to decide on the appeal with the guidance of the notes that had been taken of the proceedings before him.

Before NH Chan J, counsel for the applicant argued that he had taken out the interpleader summons in good faith and that the summons was rightly brought. Therefore he should be paid costs and not have to pay costs. Counsel for George Kent took a different stand before NH Chan J from his stand before the senior assistant registrar. He now said that the applicant should not have taken out the interpleader summons because his duty to return the documents was clear. Therefore he should bear the costs of the proceedings.

Order 17 r. 18 of the Rules of the High Court 1980 provides that "... the court may in or for the purposes of any interpleader proceedings make such order as to costs ... as it thinks just".

It is said at p. 168 of *Mallal's Supreme Court Practice*, 2nd edn, vol. 1, 1983, that "Where a person holds any money, goods or chattels which he does not claim or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong ...". That being the nature of the relief by way of interpleader, an applicant for relief, in a proper application, should, in principle, not be liable to pay costs but should instead be paid his costs by either of the claimants, because it is their conflicting claims that have compelled him to seek the relief. The claimant liable to pay the costs of the applicant should be the claimant who fails in the claim, who should also bear the costs of the successful claimant.

In this case, as I said earlier, if the senior assistant registrar had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It is only when the application is dismissed that the applicant should be liable to pay costs. By ordering that the letters be released to Interconstruction, I assume that the senior assistant registrar had found the application to have been properly brought and had proceeded in a summary way, under O. 17 r. 5(2), to "determine the question at issue between the claimants", which she did in favour of Interconstruction. So I do not think it just that the applicant pay the costs of the claimants. What would be just is that George Kent pay the costs of Interconstruction and of the applicant.

I do not think it is for me on this appeal to consider whether the senior assistant registrar was right in presumably finding that the application was proper, because there has been no appeal against that finding. George Kent, who have withdrawn their appeal against the ultimate order of the senior assistant registrar, could not have appealed against that finding because before the senior assistant registrar they did not take the stand that the application had not been properly brought and should have been dismissed. Interconstruction of course did not have reason to appeal in any case because the ultimate decision had been in their favour.

In the result, I allow the appeal and set aside the order of the senior assistant registrar as to costs and I order instead that George Kent pay the costs of Interconstruction and of the applicant. As regards the costs of this appeal, as both George Kent and Interconstruction have resisted this appeal, I order that each pay half the applicant's costs of this appeal.